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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte SIDNEY T. SMITH, WILLIAM S. HURST, BRADLEY
BUCHANAN, TIMOTHY D. LYNCH, GREGORY P. ELGAN, and
MICHAEL E. GOODWIN

Appeal 2007-3791
Application 09/813,351
Technology Center 3700

Decided:¹ March 6, 2009

Before DEMETRA J. MILLS, RICHARD M. LEBOVITZ, and JEFFREY
N. FREDMAN, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF CASE

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for anticipation and obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

The following claim is representative.

17. A flexible container composed of a polymeric material for holding at least 200L of fluid comprising:

a plurality of panels, each panel having a peripheral edge, an end, and an end segment extending from the end, the end segment having a tapered peripheral edge extending from a corresponding peripheral edge and forming an angle therebetween, the plurality of panels joined together along the peripheral edges to form a sleeve, the panels each having a fold line that cooperate to define an imaginary plane at one end of the sleeve;

an end panel composed of the plurality of end segments folded at the fold line and sealed to each other along the tapered peripheral edges, at least one angle having a range from 135.01° to about 138° and forming at least one end segment with an additional amount of material which permits at least a portion of the end panel to extend outwardly from the sleeve beyond the imaginary plane when the container is filled; and

a second end panel formed at another end of the sleeve to form a closed flexible container.

29. The flexible container of claim 17, further comprising a plurality of spaced-apart hanger connection locations at a top side of the flexible container, the hanger connection locations positioned inward from an outer edge of the top side.

36. The container of claim 15 wherein the port closure further comprises a communication member having an end attached to the port.

51. The container of claim 17 further comprising a plurality of spaced-apart hanger connectors on a top panel of the plurality of panels, the hanger connectors being located between a center of the top panel and an outer perimeter edge of the top panel.

Cited References

Sasaki	US 5,788,121	Aug. 4, 1998
Vallot	US 5,988,422	Nov. 23, 1999

Grounds of Rejection

1. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 30, 31, 52, 53, 54 and 55 are rejected under 35 U.S.C. § 102(b) as being clearly anticipated by Vallot.
2. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 23, 30, 31, 52, 53, 54, 55 and 56 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot.
3. Claims 36, 37, 38, 43 and 44 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot.
4. Claims 29 and 51 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot and Sasaki et al.

ISSUE

The Examiner contends that Appellants have admitted that Vallot teaches a sachet/box with an angle range of 120 to 150 degrees between the panel peripheral edge and the end segment tapered edge, and thus Vallot inherently is capable of extending outwardly from the sleeve beyond an imaginary plane. (Ans. 3.)

Appellants argue that the Vallot disclosure is limited to a parallelepiped and does not disclose an additional amount of material permitting the end panel to extend outwardly beyond the imaginary plane when the container is filled. (Reply Br. 1.)

The issue is whether Vallot teaches a sachet/box with an angle range of 120 to 150 degrees between the panel peripheral edge and the end

segment tapered edge, and thus Vallot inherently is capable of extending outwardly from the sleeve beyond an imaginary plane.

FINDINGS OF FACT

1. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 30, 31, 52, 53, 54 and 55 are rejected under 35 U.S.C. § 102(b) as being clearly anticipated by U.S. Patent No. 5,988,422 to Vallot. See Figs. 1 and 2. (Ans. 3.)
2. Appellants Fig. 5 of the Specification is reproduced below.

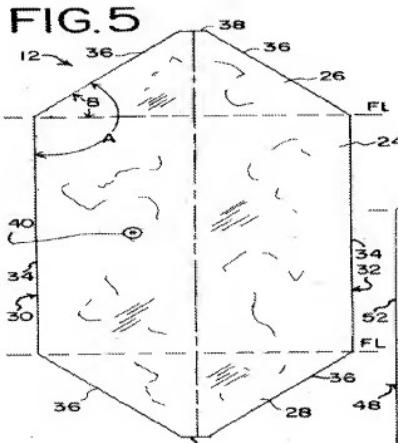


Figure 5 shows angle A between longitudinal portion 34 and tapered portion 36 of the peripheral edge 30, 32 of 135 degrees. (Spec. 10.)

3. By increasing angle A, more material is provided in the gusseted end panels 20, 22. (Spec. 10, ll. 20-25.)

4. The angle defined between the longitudinal edges 19, 19' and the tapered edges 17, 17', 18, 18' in Fig. 2 of Vallot is shown as being in the range from about 135.01° to about 138°, as claimed. (Ans. 3.)
5. Appellant's Smith affidavit, dated 3/5/2005 and filed 03/11/2005, admits that Vallot discloses an "angle range of 120° -150° between the panel peripheral edge and the end segment tapered edge." See paragraph 6 of the affidavit. (Ans. 3.)
6. The Examiner finds that, "[h]aving met [a]pplicant's claimed range of angles in claims 17 and 18, the end panels of Vallot are inherently capable of extending outwardly from the sleeve beyond an imaginary plane when in the unfolded position shown in Fig. 2." (Ans. 3.)
7. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 23, 30, 31, 52, 53, 54, 55 and 56 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot. (Ans. 4.)
8. "Vallot discloses the claimed invention, especially an angle range of 120° -150° between the panel peripheral edge and the end segment tapered edge, which overlaps applicant's claimed angle range of 135.01° to about 138° and specific angle 136°." (Ans. 4.)
9. "Vallot does not disclose end panels extending outwardly beyond an imaginary place at the ends of the sleeve as a result of an angle range of 135.01° to about 138° and specific angle 136°." (Ans. 4.)
10. The Examiner finds that,

"[T]hrough routine experimentation, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide an angle between the panel peripheral edge and the end segment tapered edge in Vallot with an angle range of 135.01° to about 138° or a specific angle 136°, in order to form the bag with end panels extending outwardly beyond an imaginary place at the ends of the sleeve."

(Ans. 4.)

PRINCIPLES OF LAW

The burden is on the Examiner to set forth a *prima facie* case of unpatentability. *See In re Glaug*, 283 F.3d 1335, 1338 (Fed. Cir. 2002). In order for a prior art reference to serve as an anticipatory reference, it must disclose every limitation of the claimed invention, either explicitly or inherently. *See In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). “[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990).

When determining whether a claim is obvious, an Examiner must make “a searching comparison of the claimed invention – *including all its limitations* – with the teaching of the prior art.” *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995) (emphasis added). Thus, “obviousness requires a suggestion of all limitations in a claim.” *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)). Moreover, as the Supreme Court recently stated, “*there must be some articulated reasoning* with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int'l v. Teleflex Inc.*, 550 U.S. 398, ___, 127 S. Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

“Appellant’s opinion on the ultimate legal issue is not evidence in the case.” *In re Lindell*, 385 F.2d 453, 456 (CCPA 1967).

ANALYSIS

1. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 30, 31, 52, 53, 54 and 55 are rejected under 35 U.S.C. § 102(b) as being clearly anticipated by Vallot. We select claim 17 as representative of the rejection before us since Appellants have not separately argued the other claims. 37 C.F.R. § 41.37(c)(1)(vii).

Appellants argue that Vallot does not disclose each and every claim element and that Vallot does not anticipate the present claims as Vallot fails to disclose a container having an end segment with 1) “an additional amount of material” permitting 2) the end panel “*to extend outwardly . . . beyond the imaginary plane* when the container is filled” as recited in independent claim 17. (App. Br. 12.)

The Examiner argues that the angle defined between the longitudinal edges 19, 19' and the tapered edges 17, 17', 18, 18' in Fig. 2 of Vallot is shown as being in the range from about 135.01° to about 138°, as claimed. “It is . . . an elementary principle of patent law that when, as by a recitation of ranges or otherwise, a claim covers several compositions, the claim is ‘anticipated’ if *one* of them is in the prior art.” *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985). (FF2; Ans. 3.)

The Examiner also argues that Appellant’s Smith affidavit admits that Vallot discloses an “angle range of 120°-150° between the panel peripheral edge and the end segment tapered edge.” (FF5; Ans. 3.) Thus, the Examiner concludes that with the same angle, the container contains the same amount of additional material and extends to the same extent beyond the imaginary plane. (FF 3.) The Examiner particularly argues that the angle range of 120° to 150° in Vallot meets Appellants’ claimed angle range of 135.01° to about 138° and thus, forms an additional amount material in

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the top and bottom panels of the container. (FF 3.) Therefore, “the additional amount of material formed by the angle range in Vallot inherently permits at least a portion of the top or bottom panel to extend outwardly from the container beyond an imaginary plane when the container is filled.” (FF 3; Ans. 7.)

We agree that the facts before us support a *prima facie* case of anticipation based on inherency based on the disclosed and admitted angle overlap with Vallot.

“[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990).

Appellants rely on the Affidavits of Smith and Hurst in support of patentability of the pending claims. Appellants argue that Vallot discloses a sachet having a parallelepiped shape when filled (Vallot, abstract, col. 3, ll. 9-15) and that

[o]ne of ordinary skill in the art would acknowledge that a parallelepiped sachet is a container with six faces, each face being parallel to the opposite face. Accordingly, Vallot’s container, ‘**by definition**’ includes a bottom face and a top face with weld crossings, the top and bottom faces being ‘**parallel to each other.**’ Vallot, col. 3, lines 12-15 (emphases added). Thus, ‘by definition’, Vallot’s parallelepiped container does not and can not include an end segment that extends beyond the imaginary plane as this would yield a container with non-parallel top and bottom faces.

(App. Br. 12.) Appellants also argue that nowhere does Vallot disclose or suggest that the sachet is anything other than parallelepiped shaped and that Vallot fails to disclose an angle range of 135.01° to 138° with sufficient specificity. (App. Br. 14.) Appellants argue that “one of ordinary skill in

the art would readily recognize that an end panel that extends beyond the imaginary plane would result in a container with non-parallel top and bottom faces-in other words, a non-parallelepiped container. *See Smith Affidavit ¶ 7* (attached as Exhibit D); *Hurst Affidavit, ¶11.*" (App. Br. 12.) Appellants argue that Vallot does not inherently disclose an end panel that extends beyond the imaginary plane. (App. Br. 12-13.) Appellants argue that *Vallot* lacks an example of a container having an angle in the recited range of 135.01° to 138°. (App. Br. 14.)

We are not convinced by Appellants' argument and affidavits. First, the sachet of Vallot is indicated to have a "substantially parallelepiped shape" (Claim 1) and thus the sachet may include minor variations from this shape. In addition, the sachet of Vallot is made of a flexible material. (Vallot, Claim 1.) Therefore, one of ordinary skill in the art would understand that when an end panel of the sachet of Vallot with the end angle disclosed of 120-150° is lifted or if the sachet is overfilled with liquid, the end panel, with its flexibility would be capable of extending beyond an imaginary plane. Appellants' affidavits fail to provide convincing evidence that the angle ranges of Vallot differ from and are not the same as, those claimed. Appellants' opinion Affidavits on the ultimate legal issue are not evidence in the case. *In re Lindell*, 385 F.2d 453, 456 (CCPA 1967).

Moreover, Appellants contend that the claimed angle range of 135.01°-138° yields unexpected results. (App. Br. 15.) While such argument may be relevant to a rejection of the claims for obviousness, it is not relevant to a rejection of the claims for anticipation. Evidence of secondary considerations, such as unexpected results or commercial

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success, is irrelevant to 35 U.S.C. § 102 rejections and thus cannot overcome a rejection so based. *In re Wiggins*, 488 F.2d 538, 543 (CCPA 1973). The anticipation rejection is affirmed.

2. Claims 2, 6, 7, 8, 12, 14, 15, 17, 18, 19, 22, 23, 30, 31, 52, 53, 54, 55 and 56 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot (Ans. 4.) Claims 36, 37, 38, 43 and 44 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot. (Ans. 4.) We select claim 17 as representative of the rejection before us since Appellants have not separately argued the other claims. 37 C.F.R. 41.37(c)(1)(vii).

Although the pending claims have been found to be anticipated, and anticipation is the epitome of obviousness, our inquiry and entertainment of Appellants' evidence with respect to unexpected results and obviousness cannot end there. And although anticipation can be proven inherently, proof of inherent anticipation is not the same as proof of obviousness. *Cohesive Technologies Inc. v. Waters Corp.*, 88 USPQ2d 1903, 1911 (Fed. Cir. 2008). See also *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) ("[A] prior art reference without express reference to a claim limitation may nonetheless anticipate by inherency."); *Trintec Indus., Inc. v. Top-U.S.A. Corp.*, 295 F.3d 1292, 1296 (Fed. Cir. 2002) ("[O]bviousness is not inherent anticipation."). Thus, "it does not follow that every technically anticipated invention would also have been obvious." *In re Fracalossi*, 681 F.2d 792, 796 (CCPA 1982). Rebuttal evidence may include evidence of "secondary considerations," such as "commercial success, long felt but unsolved needs, [and] failure of others" (*Graham v. John Deere Co.*, 383 U.S. 1, 17 (1996); and may also include evidence of unexpected results.

Appellants contend that they

have surprisingly and unexpectedly discovered that the angle range of 135.01° to 138° enables the end panels of the claimed flexible container to extend outwardly enabling full support of the flexible container by the support container. Thus, the outwardly extending end panels of the claimed container allow the hydraulic stress upon the flexible container to be transferred to the rigid support container. *Smith Affidavit* at ¶ 3-5, *Hurst Affidavit* at ¶11.

(App. Br. 15.)

Appellants contend that “*it*/the parallelepiped container of *Vallot* fails to adequately address the problem of full support within the support container as *Vallot*’s parallelepiped container is incapable of having end panels that extend beyond the fold line. *Hurst Affidavit* at ¶11.” (App. Br. 15.)

Moreover, Appellants have

surprisingly and unexpectedly discovered that the angle range of 135.01° to 138° yields wrinkle-free large volume flexible containers. This angle range permits wrinkle-free filling and draining for the claimed large volume flexible container. *Smith Affidavit* at ¶ 4-5, *Hurst Affidavit* at ¶ 11.” Wrinkling is deleterious as it prevents proper filling and drainage of the fluid contents into and from the container. *Smith Affidavit* at ¶ 5. Wrinkle-free draining is advantageous as it permits all of the bio-fluid to be removed from the container. *Hurst Affidavit* at ¶ 11. *Vallot* fails to appreciate the problems associated with wrinkling. *Hurst Affidavit* at ¶ 9.

(App. Br. 15.)

Thus Appellants conclude that

Vallot has no teaching or suggestion directed to a large volume flexible container having the unexpected results of i) rupture resistant end panels and ii) a wrinkle-free container that occur as a result of the angle range of 135.01° to 138° as recited in the present claims. *Vallot* fails to provide a specific example of a container having an angle within the range of 135.01°-1380.

We are not persuaded by Appellants' argument. "In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103." *KSR*, 550 U.S. 398, ___, 127 S. Ct. at 1741-1742; *see also In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992) ("[T]he law does not require that the references be combined for the reasons contemplated by the inventor.) Thus, it is not required that the prior art solve the same problem solved by Appellants.

While Appellants rely on the Declarations of Smith and Hurst in support of non-obviousness of the claimed invention, we do not find that the Affidavits include any evidence of non-obviousness as they are merely state conclusions with respect to the legal issue before us. Additionally, "evidence of unexpected results and other secondary considerations will not necessarily overcome a strong *prima facie* showing of obviousness." *Sud-Chemie, Inc. v. Multisorb Technologies, Inc.*, 554 F.3d 1001, 1009 (Fed.Cir. 2009).

Appellants argue that Vallot's broad angle range includes nonworkable containers, but does not provide conclusive evidence that the prior art containers are not workable. For example, the Hurst Affidavit indicates that sachet models having 120 or 150 degree angles experience wrinkling and are prone to rupture (Declaration ¶5 and 6) whereas flexible containers having the angles claimed are not. However, the Declarant provides no data or measurement of rupture weights, and does not indicate how subjective measurements concerning wrinkling were made to support

this conclusion. The Declarant's opinion on the ultimate legal issue is not evidence in the case. *In re Lindell*, 385 F.2d 453, 456 (CCPA 1967).

Thus, the Appellants have failed to overcome the Examiner's prima facie case of obviousness with appropriate evidence. The obviousness rejection is affirmed.

3. Claims 36, 37, 38, 43 and 44 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot '422.

FINDINGS OF FACT

11. Vallot '422 discloses the claimed invention, especially all of the materials used to construct the Vallot '422 container and its accessories being "capable of withstanding exposure to radiation and other known sterilization techniques." See column 3, lines 46-50. (Ans. 4.)
12. However, Vallot does not disclose the port closure (i.e. "stopper") in sterile communication with the port (i.e. "chimneys 8"). (Ans. 4.)
13. The Examiner finds that,

"[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the stopper of Vallot '422 in sterile communication with the port of the container since it was known in the art to maintain the contents of bio-pharmaceutical containers in a sterile condition."

(Ans. 5.)
14. "Regarding claims 43 and 44, the large diameter tube connector 10, small diameter tube connector 11 or 90° elbow connector 13 meet the structure of applicant's 'vent closure' to the same degree as claimed." (Ans. 5.)

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15. “Regarding claim 37, Vallot ‘422 discloses the claimed invention except for the communication member (i.e. a tube connecting to large diameter tube connector 10, small diameter tube connector 11 or 90° elbow connector 13) being about 6 ft. to about 30 ft. long.” (Ans. 5.)
16. The Examiner concludes that “[i]t would have been an obvious matter of design choice to use a 6 ft. to 30 ft. tube for the communication member of Vallot ‘422, since such a modification would have involved a mere change in the size of a component.” (Ans. 5.)
17. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955). (Ans. 5.)

ANALYSIS

Appellants fail to present any argument in response to this rejection in the Brief or Reply Brief. The rejection is summarily affirmed.

4. Claims 29 and 51 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Vallot ‘422 and Sasaki et al. We select claim 29 as representative of the claims in the rejection before us since Appellants have not separately argued the other claim. 37 C.F.R. 41.37(c)(1)(vii).

FINDINGS OF FACT

18. “Vallot ‘422 discloses the claimed device except for the top side of the container having a plurality of spaced-apart hanger connection locations.” (Ans. 5.)
19. “Sasaki et al. discloses that it is known in the art to provide a plurality of spaced-apart hanger connection locations 14.” (Ans. 6.)
20. The Examiner finds that

“It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the top side of the Vallot ‘422 container with the plurality of spaced-apart hanger connection locations of Sasaki et al., in order to permit the container to be suspended. Furthermore, the plurality of spaced-apart hanger connection locations 14 of Sasaki et al are shown as being positioned inward from an outer edge of the top side as claimed.”

(Ans. 5-6.)

ANALYSIS

Claim 29 further requires spaced apart hanger connections locations on the top side of the flexible container. Sasaki is relied on as teaching this feature.

With respect to claim 29, Appellant argues that Sasaki teaches away from large volume bags, as they teach small volume bags. Appellants further argue that Sasaki does not teach a flexible container with end segments having tapered peripheral edges. (Br. 16.)

As discussed herein, the Examiner relies on Vallot for the teachings of the subject matter of claim 17 and Sasaki for the teaching of the hanger connections as in claim 29. Appellants argue deficiencies of individual references but have not discussed or treated the teachings of the references in combination. Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The test of obviousness is “whether the teachings of the prior art, taken as a whole, would have made obvious the claimed invention.” *In re Gorman*, 933 F.2d 982, 986 (Fed. Cir. 1991) We further note that that Vallot ‘422 notes that sachets may be “in the range of 20 liters to 2000 liters” (see Col. 1, l. 16 of Vallot) and that the claimed

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200 liters falls within that disclosed range. "It is also an elementary principle of patent law that when, as by a recitation of ranges or otherwise, a claim covers several compositions, the claim is 'anticipated' if *one* of them is in the prior art." *Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 782, 227 USPQ 773, 779 (Fed. Cir. 1985).

Appellants have failed to present any argument or evidence to rebut the *prima facie* case of obviousness established by the Examiner. For the reasons discussed herein, we conclude that the combined teachings of the cited references would have rendered the container of claim 29 obvious.

The obviousness rejection is affirmed.

CONCLUSION OF LAW AND DECISION

The anticipation and obviousness rejections are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Ssc:

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